88-670

No. _____

IN THE

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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OCTOBER TERM, 1988

United States Supreme Court

THE LAW FIRM OF DANIEL P. FOSTER,
and TEXAS FARM WORKERS UNION, INC.,

Petitioners,

– against –

TURNER BROADCASTING SYSTEM, INC.
d/b/a CNN (Cable News Network, Inc.),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

L. Jeannette Clark, Esq.
Attorney for
Texas Farm Workers Union and
Law Firm of Daniel P. Foster
673 Oak Street, Suite #11
San Francisco, CA 94117

QUESTIONS PRESENTED

1. Does New York Civil Rights Law §74, the Common Law, or the First Amendment shield a cable news company from liability for false and defamatory republication of a federal executive official's statements regarding non-public judicial proceedings which statements were neither made in the course of such proceedings nor supported by them; does any such shield extend to false and defamatory reports of execution of search warrants fraudulently procured?

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JURISDICTIONAL STATEMENT

Petitioner requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review its decision filed April 13, 1988, in The Law Firm of Daniel P. Foster, P.C. and Texas Farm Workers Union, Inc. vs. Turner Broadcasting System, Inc. d/b/a CNN (Cable News Network, Inc.), Nos. 935, 936, August Term, 1986, Docket Nos. 86-7967, 86-9029, appended hereto. Jurisdiction is conferred upon this Court by 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure

Rule 12(b)

Rule 56

United States Constitution

First Amendment

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Statutes

28 U.S.C. 1652

State laws as rules of decision:

The laws of the several states, except

where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

New York State Statutes

Civil Rights Law §74

Privileges in action for libel. -- A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a

libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

STATEMENT OF THE CASE

On February 16, 1984, Daniel P. Foster, an attorney, was subpoenaed to appear before a grand jury in the United States District Court, Eastern District of New York. The subject was an alleged investigation into an alleged plan to overthrow the government of the United States by force and violence.

The proceedings were adjourned, without anything occuring, to the following day for hearing before the Court. Ex Parte Decious M-9-15- (SDNY 1984) M-149. However, a Special Agent of the FBI who had been present at the adjourned proceedings, appeared that night, ex parte before a different judge and magistrate, without informing them of the scheduled Court appearance upon subpoena the following day; and procured "search warrants" based on the same

allegations. Ex Parte Decious M-9-15-(SDNY 1984) M-149. These proceedings, too, were sealed. id.

Prior to execution of the warrants on February 19, 1984, an FBI agent called his press contacts and disseminated these allegations, which were false and defamatory. Defendant republished the allegations in a video tape of the "search" entitled "Terrorists," showing removal of cartons of material, while stating that weapons and explosives were seized. The cartons, in fact, contained thousands of files. No criminal charges resulted and no submission to a grand jury was ever made. Ex Parte Decious 85 Civ. 1654 (EDNY, 1985). Plaintiff Foster allleged the search and seizure was illegal, based on false premises and undertaken in bad faith. He sued the agents involved and the action is still pending. Foster v. John Does, 84 Civ.

1337 (SDNY).

Foster filed a defamation action in New York State Supreme Court against TBS claiming TBS republished the FBI's statements without exercising any degree of care, for the purpose of discrediting and harming Plaintiff. The tape Defendants made available for sale to the nation stated that weapons had been found, which was grossly false and misleading. The tapes provided to the Court of Appeals by TBS differed markedly from those originally offered for sale to the general public.

How these broadcasts were depicted to this Court was <u>not only misrepresentative but deliberately misleading</u>. There was a <u>substantial discrepancy</u> between "the facts" used as basis for the conclusion and the ACTUAL FACTS in question which deserve not only discovery, BUT A TRIAL.

Defendants placed three independent broadcasts on one reel as if they were subject to the same broadcast networks, methods, and locations. DIFFERENT BROADCASTS, HOWEVER, WERE SHOWN IN DIFFERENT LOCATIONS, WITH DIFFERENT NUMERICAL FREQUENCY, TO DIFFERENT SUBSCRIBER NETWORKS AND EVEN IN DIFFERENT LANGUAGES.

Only the first (February 17) of the news broadcasts -- which contained solely defamatory material without the "depiction (s of) spokespersons who criticized the law enforcement agencies' conduct" -- was distributed uniformly nationwide via the "CABLE NEWS NETWORK" on repeated news broadcasts, and in Texas, the home of the Texas Farm Workers Union, in Spanish, which, by this Court's own description, if considered alone, would constitute libel per se. The February 18 and 19 broadcasts were required to

be purchased by individual stations having contract with CCN. Thus, many viewers only saw the unquestionable libelous first broadcast, while they did not see the other broadcasts, that allegedly mitigated "defamatory" connotations of the first broadcast.

To add insult to injury, if any individual attempted to order the broadcast (on a purchase basis for home viewing), he was sent only the first broadcast with the label "Terrorist" on it. Plaintiffs have no guarantee that anyone saw the second or third broadcasts, and were given no opportunity to demonstrate the true facts.

Defendant did not controvert these allegations.

After TBS removed the case to federal court on diversity grounds, Plaintiffs sought to discover Defendant's transactions with the Government and

its editorial processes, as this court declared proper in Herbert v Lando, 441 U.S. 153. (1979). This was not permitted, as the District Court granted summary judgment in Defendant's favor, holding TBS' statements "substantially accurate and not reasonably susceptible of a defamatory connotation." (Opinion, 2d Cir at A-7 to A-8).

The Court of Appeals overruled this finding and called the statements "libellous per se", specifically ruling the FBI agent's press conference to which TBS was summoned presented a triable issue of fact as to its truth or falsity.

The Court of Appeals stated: "TBS cannot escape liability for a false and defamatory statement simply because it repreated the statement of a third party. ... It is obviously defamatory, i.e., injurious to reputation, to describe a lawyer's office as the headquarters

of an effort to overthrow the nation's government. Nor can we conclude on this record that there is no genuine issue of material fact as to the falsity of this assertion." (Opinion: 2d Cir. at A-11)

The Court of Appeals affirmed the judgment dismissing the complaint on the ground that New York Civil Rights Law §74 immunized TBS' republication of the press conference and later seizure as parts of a "judicial proceeding" from civil action, holding that "CNN published a statement by the head of the New York office of the FBI concerning the execution of a warrant issued upon the authorization of a federal judge. ... We deem it likely that the New York courts would regard CCN's report of that statement as falling within the statutory privilege." In so ruling, the Court of Appeals plainly misconstrued

not only state law, but the operative facts of this case.

The statute itself, as well as the holdings of the state's highest court do not protect such conduct, and the immunity issue was never so much as raised, argued or briefed in either court below by either party. No showing has ever been made how New York State has <u>any</u> interest in regulating dissemination of information about matters of federal congnizance. Petition for rehearing was denied as untimely.

ARGUMENT

CIVIL RIGHTS LAW §74 CANNOT IMMUNIZE REPUBLICATION OF DEFAMATORY STATEMENTS BY A FEDERAL OFFICIAL OUTSIDE THE SCOPE OF HIS OFFICE.

The New York Court of Appeals has pronounced a two-pronged test for application of the absolute privilege conferred by Civil Rights Law, Sec. 74, which remains the settled law of State of New York. Park Knoll Associates v. Schmidt, 59 N.Y. 2d 205 (1983). Absolute privilege is: (1) based upon the personal position or status of the speaker; and (2) limited to the speaker's official participation in the processes of government. Neither of the two prongs is met in this case.

The statutory privilege is a narrow one, applying only where public interest requires the statements be absolutely

privileged, so those discharging a public function may speak freely insulated from harassment and fear of financial hazard. As the New York Court of Appeals noted in Park Knoll, it is the policy of New York courts to "confine absolute privilege to a very few situations."

Unquestionably, TBS is not immune from conduct the statute deems privileged, unless TBS was reporting a judicial or legislative proceeding. It was not; rather, it reported false and defamatory statements of an official of the executive branch of the United States Government made at a press conference, and its own view of an illegal search and seizure.

As the Court of Appeals noted in this case, TBS cannot escape liability simply because it repeated the statement of a third party. Plaintiffs were not given an opportunity below to prove the degree of TBS' fault in republication

of statements of the third party, (nor has this Court defined what degree is actionable under the law where harm is caused to a private figure.

The Court of Appeals' reliance on Chapadeau v. Utica Observer-Dispatch, 38 N.Y. 2d 196 (1975) in finding the "Firm is a private figure in a matter of public concern," is misplaced. Here, unlike Chapadeau, the subject matter of the reports was false; and TBS made no effort to confirm the reports prior to publication. The district Court's refsual to permit discovery on this issue represented clear defiance of this Court's mandate in Herber v. Lando, 441 U.S. 153 (1979).

Cogent reasons underly the imposition of a stricter standard upon Defendants where private persons are involved even in regard to matter of "public concern"; The only thing of "public concern" in

this case, however, was the lies and misconduct of government agents and TBS itself. The instigation of fraudulent judicial proceedings or false public concern will not abrogate this constitutional requirement. (See Gertz, supra). Even if the search created a matter of public concern, Walton's report was grossly irresponsible (See Chapadeau, supra at 199); and was not "fair and true" (CRL § 74); nor was TBS's repetition of his statements. Mr. Walton's statements of imminent insurrection were grandiose and ludicrous, and the FBI's conclusions clearly unsupported by the agency's own data.

Furthermore, the New York statute itself, in its second paragraph, specifically states that an official's comments made outside the course of

proceedings in which he is involved, wherein he adds material not part of the record, is not entitled to any immunity.

Mr. Walton's report was not "fair and true" because it did not explain the circumstances attending the judicial proceedings actually extant and the fact the "proceeding" to which he does not refer, was ex parte, and based solely on double hearsay and rumor. He represents his statements as factual, and those statements are not even supported by the affidavit underlying the warrants.

More importantly, the newscast described a search in false and inaccurate terms, which search was not ajudicial proceeeding but an executive one. And throughout the matter Mr. Walton was an executive officer, dealing with a mattter alleged only a day before to

be a "grand jury" matter, where there is a statutory duty to keep silent to protect the innocent. Fed. R. Crim. P. 6.

While Mr. Walton was disseminating reports of results expected from the search before it was conducted, he was simultaneously hiding its existence from both Plaintiffs and the United States Courts.

Under New York State law there is a broader privilege to publish the contents of judicial proceedings than executive proceedings, and the judicial proceedings privilege applies only to those proceedings the judiciary deems publishable. In Cianci v. New York Publishing Co., 639 F. 2d 54 at 67 (1980) the Second Circuit Court of Appeals noted that under the common law, privilege does not in general include non-public judicial proceedings. At the time of Mr. Walton's statements,

all material relating to judicial proceedings in the federal courts were under seal at the order of federal judges upon the application of the United States Attorney. See Ex Parte Decious, 84 M-149 (EDNY 1984); Fed. R. Crim. Proc. 6, supra.

The privilege is very narrow which is conferred upon officials of the executive branch in cases like this: "The nonjudicial, non legislative absolute privilege...extends only to high officials of the executive branch of State and local government." Clark v. McGee, 49 N.Y. 2d 613 (1980). It is not clear that the statute immunizes federal executive officials at all, or that the State has the power to shield officers of a foreign sovereignty at the expense of its own citizens' rights on the basis of statements made about a non-New York State "proceeding." That conclusion

does not flow from the common law of the State of New York, which the statute codifes; and no case has ever so held.

In Toker v. Pollack, 44 N.Y. 2d 211 (1978), the New York Court of Appeals found no privilege for statements of a confidential secretary to a New York State Supreme Court Justice to a district attorney regarding possible criminal acts by an assistant corporation counsel seeking judicial office. The Court noted that a communication to a police officer, like Mr. Herman or Mr. Walton, is "far removed from a judicial proceeding," and that "a policeman is not a judicial officer." His statements are not privileged under Civil Rights Law Sec. 74.

As a result, in Stuckuls v. State of New York, 42 N.Y. 2d 272 (1977), the court refused to immunize one acting as a college president based on his

official status as State University employee. The Court of Appeals stated the New York criteria for the first prong of the test for application of CRL 74:

> "unless an official is a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension, policy considerations do not require that he be given absolute license to defame." id, at 744. (emphasis added).

Mr. Walton very simply had no such responsibility in his job -- certainly none that would require his making such a statement before engaging in an illegal, exploratory search, the fruits of which proved his claim impossible, and statement irresponsible in the extreme. If Mr. Walton was not immunized from tort liability in his statement, TBS can claim no statutory immunity in

republishing his comments, which the Court of Appeals found defamatory per se.

Furthermore, it is clear the statement in question was not made in the course of Mr. Walton's official duties, much less in the course of any "proceeding." As the New York Court of Appeals noted in Park Knoll, even in the case of a judicial officer, "the immunity does not attach solely because the speaker is a Judge, attorney, party or a witness, but because the statements are, in the words of Lord Mansfield, 'spoken in office.'" id, 464 N.Y.S. 2d at 427.

See also, the case of Clark v. McGee, where statements by a town supervisor during a radio interview were not privileged under statute because there

> "exist powerful countervailing considerations which preclude broad application of expansion of this privilege. Public office does not carry with it a license to defame at will, for even the highest officers exist to serve the public, not to denigrate its members. ...the privilege is not to be extended liberally, and instead must be carefully confined to that type of situation in which the protection provided by the privilege will serve a necessary societal function.

SUA SPONTE APPLICATION OF ABSOLUTE IMMUNITY UNDER CRL §74 ON APPEAL REQUIRED REMAND FOR FURTHER FACT-FINDING

In Helvering v. Gowran, 302 U.S. 238 (1937) this court, while recognizing that an Appeals Court may raise an issue sua sponte, limited its holding with the caveat that if new facts become relevant, the case must be remanded for further proceedings. Remand is also mandated here.

In Gowran, at least the ground raised sua sponte had been raised in the Court below and rejected. This case is even more extreme -- the ground upon which this appeal was decided was never raised by the parties at all. Petitioner respectfully suggests, that had this matter been decided in a New York State

Court, not only would it have survived summary judgment, but the statutory immunity issue would have been deemed waived by Defendant for its failure to have it raised in the trial court.

Rule 12 of the Federal Rules of Civil Procedure provides that whenever a motion to dismiss for failure to state a claim upon which relief can be granted (the mode by which the immunity question should have been raised) and the Court needs to consider matters beyond the pleadings, in this case the records of Ex Parte Decious, supra, Foster v. John Does supra, and the Government's conduct in the search and seizure, the matter must be dealt with as one for summary judgment and the Plaintiff must be given an opportunity to be heard on all matters that would be properly considered in a motion pursuant to Rule 56.

The New York Court of Appeals has indicated the application of the privilege depends on

(1) the subject of the statement, and

(2) the circumstances in which it was made.

Since the statement was not made in the course of carrying out the supervisor's official duties, it was not necessary to the efficient operation of the government. The policy behind the statute; and hence was not entitled to protection there under. Accord, Cheatum v. Wehle, 5 N.Y. 2d 585 (defamation of staff by State Conservation Commissioner in the course of after-dinner speech); Kilcoin v. Wolansky, 75 A.D. 2d 1 (AD

2 1980) (allegations in newspapers of patient abuse by Chief of Service of Developmental Center); Doran v. Cohalan, 125 A.D. 2d 289 (AD 2 1936)(defamation in Newsday by Suffolk County Executive and Comptroller). Santavicca v. City of Yonkers, 18 N.Y.S. 2d 298 (1987) has recognized this rule as the prevailing law of the State of New York. See, e.g., Hammerhead Enterprises v. Brenenoff, 707 F. 2d 33, 40 (1983).

Furthermore, the broadcast itself was materially misleading. It showed seizure of box after box of material described as "contraband," implying the FBI report of "weapons" seized was true, when all the boxes contained was papers.

Plaintiffs continue to take the position the entire search was exploratory and undertaken in bad faith; that the

Magistrates were the victims of multiple misrepresentations and that one of the improper motives behind the news conference was the malicious defamation of Plaintiffs as well as the seizure of attorney-client privileged papers the Government had no right even to see. See, Williams v. Williams, 23 N.Y. 2d 592, 298 N.Y.S. 2d 473 (1969); Gurda v. Orange Publ. Div., etc., 81 A.D. 2d 120 (AD 2 1981). Plaintiffs were entitled to prove their claims. Where the processes of the court are abused, there is no privilege conferred by their existence under any law.

All of these are fact issues for the jury, and the proper subject of discovery. The decision of the Court of Appeals must be modified and the case reversed and remanded for trial, or at least to permit Plaintiffs to amend their complaint in the event these allegations need to be made more clear therein.

The facts of this case show that waiting a number of days or even hours would have permitted verification of the Government's allegations and furnished protection to the Plaintiffs.

Since it was acting in the capacity of "press organ" for the Government, our legal system demands Defendant retain its responsibility to report the truth. The First Amendment does not protect the destruction of an individual reputation at the Government's behest, any more than it protects Government intrusion into free speech or assembly.

It is unquestionable that when the Government's hypothesis of "insurrection" proved unfounded, press interest disappeared along with FBI statements about the subject. Neither the Government nor TBS exercised any care, but went out of their way to generate unfounded, sensationalized

reports. Plaintiffs maintain that not only is there no constitutional privilege or neutral reportage as to private figures but that this is not a case of neutral reportage. The statements were libellous per se under New York State law: once the damage was done, nothing could be done to balance it out by way of "equal time" or otherwise.

As the Second Circuit recognized in Bufalino v. Associated Press, 692 F. 2d 266 (1982) there is no privilege for reporting offical records where the records were not relied on in the publication. Here it is clear that TBS could not have checked anything on file with any court (which records were sealed). TBS relied solely on the comments of Mr. Walton, not made in the course of his duties, but at a news conference, whose purpose was to promulgate publicity for his agency.

TBS did not, "in good faith elicit both sides of the story" (See, Edwards v. National Audubon Society, 556 F 2d 113 (CA 2 1977)) before the first broadcast -- the broadcast was made presenting only the government's defamations and Plaintiff's denials.

The question posed by the Government was "is there a plot to overthrow the government by insurrection tomorrow?" the answer to which could only be "no." At that time, the matter ceased to be one of public importance, because it never was one to begin with. Compare, Cianci v. New York Times Publ. Co., supra.

This Court has ruled that State Law determines the liability for republication of defamatory statements. See, Gertz v. Robert Welch, Inc., supra. Under New York State law, a fact issue exists whether TBS exercised

appropriate care in repeating what it was told. (See Daraduman v. Newsday, Inc., 51 N.Y. 2d 531, 435 N.Y.S. 2d 556, 416 N.E. 2d 557 (NY Ct App 1980)). The distinction between the case of Orr v. Lynch, 60 A.D. 2d 949, in Hogan v. Herald Co., 84 A.D. 2d 470, the New York Court found that allegations of fixing an arrest which had not occurred did not make the matter one of "public concern".

The fact that Defendant was interfering with private businesses which were not otherwise in the public eye is a distinction requiring news corporations such as TBS to exercise a greater degree of care and to take the time required to ascertain the facts before propelling them into such a controversy. As this Court has indicated, public-figure-privilege does not apply to a private firm.(See Dun & Bradstreet, Inc. v. Greenmoss Builders, Incorporated,

105 S. Ct. 2939 (1985)).

That the Court of Appeals adopted an erroneous view of the State of New York law is not surprising, given that the issue of statutory immunity was raised and decided sua sponte. The Court correctly held itself bound by New York defamation law, see 22 USC 1652, which still respects the common law presumption of falsity in private figure libel cases; see, 44 NY Jur. 2d § 171. But, it clearly misconstrued the application of NY CRL §74.

The Court of Appeals ignored the cases, see, e.g. Williams v. Williams 23 N.Y. 2d 592, limiting the statute's coverage where allegations of fraud and abuse of the judicial process are raised. In Williams, the New York Court of Appeals held that no immunity can protect statements made in actual litigation for purpose of defaming or

injuring the Defendant. The jurisdictional facts predicating this bar to statutory application were not before the Court of Appeals on motion for summary judgment and concerned material as to which discovery was not permitted.

This Court ruled, in Herbert v. Lando, that even in a public figure libel case, the Plaintiff who was victim of a defamatory falsehood was entitled to discover the editorial process used by the Defendant. In this case, that checking of sources is co-extensive with the manner of transmission of information from the government which gave rise to Plaintiffs' charges of collusion below. The question raised here is a very serious one -- does the New York Statute, common law rule, or First Amendment freedom of the press shield a cable company from maliciously disseminating defamatory falsehood at the behest of the government

about a private figure? Plaintiffs submit the answer to this question is "no." The statute is not applicable to these facts. The common law rule does not immunize publication of non-public judicial proceedings. See Cianci, supra. Freedom of the press protects the press against government overreaching, and is not a sword by which the government and press can cooperate to harm individual rights to be free tortious damage protected by time-honored common law rules and traditions.

In short, the Plaintiff having been denied their discovery and trial in the District Court by factual findings found by the Court of Appeals to be completely erroneous, were denied their action and any Appellate review by the improper handling of this case by the Court of Appeals. That Court's ruling

stands in contradiction to the settled law of Civil Procedure and the decisions of this court, and further, is so far removed from the due course of judicial proceedings as to warrant this court's intervention by writ of certiorari.

CONCLUSION

It is clear that this court misapprehended and misapplied the New York State law in this case; that no applicable law protects Defendant from tort liability for acts committed against Plaintiffs; that Plaintiffs were wrongfully denied opportunity to be heard at trial and on appeal; and that summary judgment was improperly granted in this case because the Court of Appeals so transcended the ordinary course of procedure and held in a manner contrary to the decisions of the New York Court of Appeals and this Court, writ of certiorari should be granted by this Court.

Dated: New York, New York
July 11, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 935, 936—August Term, 1986

(Argued: March 18, 1987 Decided: April 13, 1988)

Docket Nos. 86-7967, 86-9025

THE LAW FIRM OF DANIEL P. FOSTER, P.C. and
THE TEXAS FARM WORKERS UNION, INC.,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

TURNER BROADCASTING SYSTEM, INC.
d/b/a CNN (CABLE NEWS NETWORK, INC.),

Defendant-Appellee-Cross-Appellant.

Before:

KEARSE, MINER and MAHONEY,
Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, John F. Keenan, *Judge*, granting defendant-appellee-cross-appellant's motion for summary judgment and denying plaintiffs-appellants-cross-appellees' motions for summary judgment and for an extension of time for

discovery, and denying both parties' motions for sanctions. Plaintiffs-appellants-cross-appellees contend that they were libeled by three news broadcasts by defendant-appellee-cross-appellant, which in turn claims that the broadcasts were not defamatory and in the alternative were substantially true, and seeks sanctions in its cross-appeal.

Affirmed.

DANIEL P. FOSTER, P.C., New York, New York (Pro Se), *for Plaintiffs-Appellants-Cross-Appellees.*

LAWRENCE B. FRIEDMAN, New York, New York (Richard F. Ziegler, Cleary, Gottlieb, Steen & Hamilton, New York, New York, of counsel), *for Defendant-Appellee-Cross-Appellant.*

MAHONEY, *Circuit Judge*:

Plaintiffs below, The Law Firm of Daniel P. Foster, P.C. (the "Firm") and The Texas Farm Workers Union, Inc. ("TFWU"), bring this appeal from a judgment entered on a memorandum and order of the United States District Court for the Southern District of New York, John F. Keenan, *Judge*, denying their motion for summary judgment and granting the motion of defendant Turner Broadcasting System ("TBS") for summary judgment dismissing the complaint. TBS cross-appeals from the denial of Rule 11 sanctions below.

Plaintiffs' complaint alleged that plaintiffs were defamed by three news broadcasts concerning a search conducted by the Federal Bureau of Investigations ("FBI") and the Bureau of Alcohol, Tobacco and Firearms (the "Bureau") at the Firm's offices at 1107 Carroll Street, Brooklyn, New York. The district court found that the reports were not defamatory, and in any event were substantially accurate. In addition, the court denied all parties' motions for sanctions under Fed. R. Civ. P. 11, and denied plaintiffs' motion for further discovery as unlikely to provide any information that would alter the court's conclusions.

We affirm.

Background

This case stems from three news reports by Cable News Network, Inc. ("CNN"), a wholly owned subsidiary of TBS,[1] concerning searches of the offices of the Firm at 1107 Carroll Street, Brooklyn, New York conducted by agents of the FBI and the Bureau on February 17, 1984. The searches were conducted under authorization of warrants issued by Judge Henry Bramwell and Magistrate Nina Gershon of the United States District Court for the Eastern and Southern Districts of New York, respectively. The warrants were issued after FBI Special Agent Neil E. Herman provided an affidavit asserting that an ongoing investigation by the FBI indicated that a revolutionary group called the Provisional Party of Communists ("PPC") was headquartered at 1107 Carroll Street in

1 The caption of this litigation is in error in stating that TBS does business as CNN. Apparently, only TBS has been served. In view of our disposition of this appeal, we need not address TBS' contention that it is not responsible for the torts of its separately incorporated subsidiary.

Brooklyn, New York.[2] The affidavit stated that the FBI expected to find a cache of weapons, together with documents pertaining to a planned uprising against the United States government, through a search of that building and several other New York City area locations. According to the FBI inventories prepared as a result of the February 17 search, the agents seized from the Firm's office, *inter alia*, a disassembled handgun, firearm parts, a mace cannister, a hand grenade (unloaded), ammunition, various knives and razors, a machete, a sword, a blackjack, a bayonet, handcuffs, court officer and police shields or badges, weapon manuals and instructions, and records of weapon purchases.

CNN broadcast three television news reports concerning the FBI searches and seizures as part of its regular news coverage. The first of these reports was aired on February 17, 1984, the day the warrants were executed. In it, a CNN reporter, Tom Hendricks, narrated what had transpired at 1107 Carroll Street that day. He reported that no one had been arrested and no explosives were found in connection with the searches and seizures, and that "there were strong denials of any wrongdoing." He stated that the building's inhabitants "describe themselves as leftist organizers, worker rights groups and mutual benefit associations, and at least one union, the Texas Farm Workers . . . . gathered in New York over the weekend for a series of meetings on how to improve the plight of workers," who were "not terrorists and planned no violence." In addition, a statement by FBI Associate Director Kenneth Walton indi-

2 The headquarters of the PPC was asserted to be located at Apartment 2A at that address, but the weapons and documents were allegedly to be found in Apartment 2A, Apartment 1A, the law offices of the Firm, and the basement of the building at that address, as well as at other locations in Brooklyn and Manhattan.

cated that planned "violent acts" by the PPC, the group allegedly housed there, prompted the FBI's search. Finally, an unidentified attorney "hired to represent the activists" described the search as "outrageous" and "unconscionable."

The second CNN report concerning the incident occurred the next day, February 18, 1984. That report included another segment of the Walton interview taped the day before, and additional statements by the attorney, who stated that he had represented the occupants of the building "off and on since 1972," describing them as "civil rights workers." Hendricks commented that there had been no violence during the searches, although resistance had been expected, and that "[t]ruckloads of contraband were seized including an unspecified number of weapons, according to the FBI." CNN reiterated that no explosives were found and no arrests were made. Hendricks concluded this report by stating that the "activists" he had talked to at the various search locations denied being part of a dangerous plot and asserted they were not even Communist Party members, but that the FBI still maintained that the evidence it seized supported its claim that a "dangerous organization has been stopped."

The third and last news report of the incident was broadcast on February 20, 1984, and consisted primarily of interviews with several people at 1107 Carroll Street who were sharply critical of the FBI raid, said there was no association between the tenants of that building and the PPC, and described the tenants as peaceful. The broadcast began, however, with the following:

Reporter: In the Friday raid while no explosives were found and no arrests made, the FBI claimed it had foiled:

Kenneth Walton: An effort to topple the Government of the United States, if you will. The national headquarters was 1107 Carroll Street in Brooklyn.

Reporter: It is the address of a lawyer's office, where now no one admits to ever even hearing of the organization called the Provisional Party of Communists.

Hendricks later commented that "Daniel Foster's office is the supposed headquarters." Hendricks reiterated that no arrests were made and no explosives were found, and concluded the broadcast by stating that "unless the confiscated material and earlier information which led to the raids backs its claims, it may be the FBI itself on trial."

The Firm and TFWU subsequently filed suit in the Supreme Court of the State of New York, County of New York. TBS removed the case to the United States District Court for the Southern District of New York on the basis of diversity of citizenship. The Firm and TFWU alleged that TBS' news broadcasts on this subject displayed the Firm's offices in the background while making false statements that "truckloads of contraband and weapons" and "an unspecified number of weapons" were removed from the premises, and that the materials were seized from the "Provisional Party of Communists, . . . but attorney

Daniel P. Foster says these are his law offices."[3] In addition, the complaint alleged that Texas broadcasts of the report referred to the Firm's offices as the "New York headquarters of the Texas Farm Workers Union."[4] Finally, the complaint asserted that these false allegations were defamatory, since they would wrongly lead viewers to believe that the Firm's offices were the headquarters of the terrorist PPC and that weapons and contraband were seized from the premises, and that TBS had no reasonable cause to believe these allegations.

Both parties moved for summary judgment. The district court found the reports taken as a whole not to be reasonably susceptible of a defamatory connotation, since they "depicted spokespersons who criticized the law enforcement agencies' conduct as well as statements by [FBI spokesman] Walton and the overall tenor of the reports suggested that perhaps the agencies were mistaken in carrying out the searches and seizures." Further, the Court held that even if the reports were susceptible of a defama-

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3 This language does not appear in the actual broadcasts. The pleading is apparently a clumsy reference to the portion of the February 20 broadcast quoted *supra* at p. 7. Defendant cites authorities for the proposition that the libel must be pleaded *in haec verba*, reasoning inventively from this premise that plaintiffs must rely upon the garbled version of the February 20 broadcast stated in their complaint. The "*in haec verba*" requirement, however, is no longer the rule in this circuit. *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986); *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980).

4 These alleged "Texas broadcasts" are not reflected in the record before us. The only reference to the TFWU in the three videotapes and transcripts presented to the court occurs in the initial February 17 report, where it is stated that among those gathered at 1107 Carroll Street "for a series of meetings on how to improve the plight of the workers" was "at least one union, the Texas Farm Workers." All participants were described by CNN as "vehement in their statement that they were not terrorists and planned no violence."

tory connotation, they were substantially accurate and thus protected by the "defense of truth."[5] Concluding that plaintiffs had "raised no evidence sufficient to meet the 'clear and convincing' standard they must satisfy in order to oppose successfully defendant's motion for summary judgment,"[6] the court granted defendant's motion for summary judgment and dismissed the complaint. The court also denied plaintiffs' motion for summary judgment and sanctions, and defendant's motion for sanctions. Finally, the court denied plaintiffs' motion for a "continuance of consideration" of defendant's motion for summary judgment pending further discovery, since "nothing that could be revealed by answers to interrogatories" could alter the court's conclusions as to the accuracy and non-defamatory nature of the broadcast reports.

Discussion

Summary judgment must be entered after adequate time for discovery and upon a motion under Fed. R. Civ. P. 56(c) "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552-53 (1986); *see also*

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5 Although truth is a matter of affirmative defense under the common law of defamation, a public figure plaintiff, *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or private figure plaintiff involved in a matter of public concern, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, _____, 106 S. Ct. 1558, 1559, 1563-64 (1986), has the burden to establish falsity.

6 The court cited *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), at this juncture, but *Anderson* applies the "clear and convincing" standard only to summary judgment determinations concerning the issue of actual malice. 477 U.S. at _____, 106 S. Ct. at 2514.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986). When a motion for summary judgment is adequately supported by affidavits made on personal knowledge, which may be supported by documentary exhibits, depositions, answers to interrogatories or further affidavits, it must be controverted by a similar response setting forth "specific facts showing that there is a genuine issue for trial," absent which summary judgment shall be entered, if appropriate; the opposing party "may not rest upon the mere allegations or denials of [his] pleading . . . ." Fed. R. Civ. P. 56(e). Put another way, there must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

Under familiar principles, New York law is to be applied in this (removed) diversity case, subject to applicable first amendment requirements. At the outset, we apply New York's "choice of law" standards, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), resulting in the application of New York substantive law. *See Cianci v. New Times Publishing Co.*, 639 F.2d 54, 70 (2d Cir. 1980); Restatement (Second) of Conflict of Laws § 150(2) and comment e (1971).[7]

The Firm is a private figure involved in a matter of public concern. *See Chapadeau v. Utica Observor-Dispatch, Inc.*, 38 N.Y.2d 196, 198-99, 379 N.Y.S.2d 61, 63-64, 341 N.E.2d 569, ____ (1975).[8] The CNN news reports clearly

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7 The defamation claims of TFWU, considered *infra* at pp. 19-20, may be subject to Texas rather than New York law, but are not viable in either event.

8 TFWU is either such a private figure or a public figure. In either event, it has the burden of proving falsity. *See supra*, note 5.

relate to a matter of public concern, both as to the FBI's contentions of terrorist activity and the other interviewees' responses to the searches and seizures.

This case is accordingly governed by *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558 (1986), which holds that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." *Id.*, 475 U.S. at ____, 106 S. Ct. at 1559; *see also id.*, 475 U.S. at ____, 106 S. Ct. at 1563-64. *Cf. Hustler Magazine v. Falwell*, ____ U.S. ____, ____, 108 S. Ct. 876, 882 (1988) ("false statement of fact" constitutionally required for public figures and public officials to recover for intentional infliction of emotional distress). This burden of proving falsity is independent of any demonstration of fault, and is a prerequisite to recovering damages. *Philadelphia Newspapers*, 475 U.S. at ____, 106 S.Ct. at 1563. Furthermore, defendant is held only to a standard of substantial, not literal, accuracy. *See Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988); *Tavoulareas v. Piro*, 817 F.2d 762, 787 (D.C. Cir.) (in banc), *cert. denied*, 108 S.Ct. 200 (1987); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (2d Dep't 1981); Restatement (Second) of Torts § 581A comment f (1977). The accuracy of the report should be assessed on the publication as a whole, not isolated portions of it. *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 838, 386 N.Y.S.2d 871, 874 (1976).

We now apply these criteria to the facts of this case. Based on the record presented to us, we see no genuine issue of material fact as to the alleged falsity of the report that "[t]ruckloads of contraband were seized including an

unspecified number of weapons, according to the FBI." Under familiar principles of defamation law, CNN cannot escape liability for a false, defamatory statement simply because it repeated the statement of a third party, here the FBI. Restatement (Second) of Torts § 581A comment e (1977).[9] Except for conclusory assertions, however, the Firm and TFWU have made no showing that this statement was not substantially accurate. In any event, the common law privilege for reports of official proceedings considered hereinafter would immunize this statement as a basis for tort liability.

The quotation of FBI spokesman Walton charging that 1107 Carroll Street in Brooklyn was the "national headquarters" of "[a]n effort to topple the Government of the United States," coupled with CNN's immediate follow-up that this was "the address of a lawyer's office," and a further statement in the same (February 20) broadcast that "Daniel Foster's office is the supposed headquarters," stands on a different footing. As stated earlier, TBS cannot escape liability for a false and defamatory statement simply because it repeated the statement of a third party. It is obviously defamatory, *i.e.*, injurious to reputation, to describe a lawyer's office as the headquarters of an effort to overthrow the nation's government. Nor can we conclude on this record that there is no genuine issue of material fact as to the falsity of this assertion.

We affirm the district court's dismissal as to this alleged libel, however, on a ground not considered below, as we are permitted to do. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Specifically, we deem the common law privilege for reports of an official proceeding, as codified at

9 As we discuss hereinafter, a claim of common law or constitutional privilege is sometimes available in such circumstances.

N.Y. Civil Rights Law § 74 (McKinney 1976) and interpreted in New York cases construing that statute and its predecessors, to preclude liability here and provide a basis for affirmance of the judgment below with respect to the "national headquarters" statement.

Section 74 provides:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

N.Y. Civil Rights Law § 74 (McKinney 1976).

This statute has been construed as applicable to reports of an investigation by the New York City Department of Consumer Affairs into the sales practices of air conditioner repair shops, *Freeze Right Refrigeration and Air Conditioning Services, Inc. v. City of New York*, 101 A.D.2d 175, 475 N.Y.S.2d 383 (1st Dep't 1984); a district attorney's investigation, *Baumann v. Newspaper Enterprises, Inc.*, 270 A.D. 825, 60 N.Y.S.2d 185 (2d Dep't 1946); and an internal governmental investigation of the Federal Civil Works Administration, *Farrell v. New York Evening Post, Inc.*, 167 Misc. 412, 3 N.Y.S.2d 1018 (Sup. Ct. 1938). Most pertinent here, the privilege has been applied to a report of the execution of an arrest warrant and search warrant. *Kramer v. News Syndicate Co.*, 260 A.D.

17, 20 N.Y.S.2d 700 (1st Dep't), *rev'd on other grounds*, 284 N.Y. 557, 32 N.E.2d 552 (1940). *See also Josephs v. News Syndicate Co.*, 5 Misc. 2d 184, 159 N.Y.S.2d 537 (Sup. Ct. 1957) (report of arrest and arraignment); *Hornyak v. Hearst Corp.*, 66 N.Y.S.2d 848 (Sup. Ct. 1946) (report of arrest, charge, commitment, indictment, parole and discharge), *aff'd*, 272 A.D. 866, 71 N.Y.S.2d 713 (1st Dep't 1947). It has been held inapplicable, on the other hand, to a statement by an individual police officer concerning an investigation which he was conducting. *Kelley v. Hearst Corp.*, 2 A.D.2d 480, 483-84, 157 N.Y.S.2d 498, 502 (3d Dep't) (citing *Nunnally v. Press Publishing Co.*, 110 A.D. 10, ____, 96 N.Y.S. 1042, 1044 (2d Dep't 1905)), *amended*, 3 A.D. 2d 610, 158 N.Y.S.2d 781 (3d Dep't 1956), *appeal denied*, 3 A.D.2d 963, 163 N.Y.S.2d 937 (3d Dep't 1957).

Here, CNN published a statement by the head of the New York office of the FBI concerning the execution of a warrant issued upon the authorization of a federal judge.[10] Based upon the foregoing authorities, we deem it likely that the New York courts would regard CNN's report of that statement as falling within the statutory privilege. It is clear, furthermore, that the report was "fair and true," as required by the statute. As to truth, it was a verbatim quotation of FBI Associate Director Walton. As to fairness, the quotation was balanced by eight interviews in the same broadcast which challenged the *bona fides* of the FBI search, and a concluding statement by the CNN reporter

10 The warrant issued by Magistrate Gershon was presumably for the Manhattan search. The Brooklyn search at issue here was authorized by Judge Bramwell.

that "it may be the FBI itself on trial."[11] Finally, since there is no factual dispute concerning the text of the CNN broadcast or the official authorization for and nature of the FBI search, the statutory privilege provides a proper basis for affirmance of the district court's award of summary judgment with respect to the "national headquarters" report.

We therefore need not consider the possible applicability of the first amendment privilege of neutral reportage articulated by this court in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied sub. nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977).[12] We later construed *Edwards*, in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 67 (2d Cir. 1980), as applying this privilege to cases involving public officials or figures. It would therefore be at least arguably an exten-

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11 The statute also provides, in its second sentence, that the privilege "does not apply to a libel contained in any other matter added by any person concerned in the publication." Here, CNN's reporter added that "Daniel Foster's office is the supposed headquarters" to the FBI's assertion that the "national headquarters" of "[a]n effort to topple the Government of the United States" was located at 1107 Carroll Street. In *Hanft v. Heller*, 64 Misc. 2d 947, _____, 316 N.Y.S.2d 255, 258 (Sup. Ct. 1970), however, it was held that the addition of the plaintiff's name to a summary of a judicial opinion (from which that name had apparently been deleted when the opinion was simultaneously published) did not deprive the summary of the protection of the statutory privilege.

12 We note that one New York court has repudiated the *Edwards* rule. *See Hogan v. Herald Co.*, 84 A.D. 2d 470, 446 N.Y.S. 2d 836, 842 (4th Dep't), *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982). Another, however, has cited it favorably. *See Orr v. Lynch*, 60 A.D.2d 949, 950, 401 N.Y.S.2d 897, 899 (3d Dep't), *aff'd*, 45 N.Y.2d 903, 383 N.E.2d 562, 411 N.Y.S.2d 10 (1978). In any event, were we to reach the issue, we would not be bound by the expressions of New York courts concerning this issue of federal constitutional law, contrary to the rule concerning questions of state law arising in diversity cases.

sion of *Edwards* to apply it to litigation brought by a private figure involved in a matter of public concern, such as the Firm, and we should not address this constitutional question where there is an independent state ground on which the district court judgment may be sustained. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *Cf. Virginia v. American Booksellers Ass'n, Inc.*, ____ U.S. ____, 108 S. Ct. 636 (1988) (certifying questions to obtain authoritative state construction of a statute before considering first amendment challenge to statute).

As to the claims of TFWU, the videotapes and scripts in the record do not contain any assertion that the Firm's law offices were also described, as alleged in the complaint, as the "New York headquarters of the Texas Farmworkers Union," an assertion allegedly made in "Texas broadcasts and telecasts." The only reference to the TFWU in the broadcasts included in the record is a wholly tangential statement that among those gathered at 1107 Carroll Street "for a series of meetings on how to improve the plight of the workers" was "at least one union, the Texas Farm Workers." All participants were described by CNN as "vehement in their statement that they were not terrorists and planned no violence." No defamation is apparent.

Finally, we view Judge Keenan's denial of a continuance for the purpose of further discovery as falling well within his discretion on this record. *See, e.g., Howell v. Management Assistance, Inc.*, 519 F. Supp. 83, 87 (S.D.N.Y. 1981), *aff'd mem.*, 685 F.2d 424 (2d Cir.), *cert. denied*, 459 U.S. 862 (1982). As to defendant's cross-appeal with respect to the denial of sanctions below and further application for sanctions on this appeal, there is no objective basis, as is required, *Eastway Constr. Corp. v. City of*

New York, 762 F.2d 243, 253-54 (2d Cir. 1985), for sanctions at either level in view of our disposition of a major question in this case on a ground not considered below, nor briefed or argued here.

Conclusion

The judgment of the district court is affirmed.

725—4-15-88 • USCA—80004

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UNITED STATES COURT OF APPEALS

For the Second Circuit

THE LAW FIRM OF
DANIEL P. FOSTER, et. al.

-against-

TURNER BROADCASTING
SYSTEM, ETC.

Docket
86-7967
86-9025
ORDER

Brief statement of the relief requested:

Two week extension of time to file Petition for Rehearing en banc; leave to file and serve carbon copies of same; leave to file a petition longer than 15 pages; stay of mandate.

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

Hon. Justice J.P. Mahoney
May 11, 1988[1]

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[1]The Petition for reargument was filed timely, however, was refused by the clerk as the covers were the wrong color. The covers were corrected within hours, but it was after five o'clock. The petition for rehearing was filed the next morning.

UNITED STATES CONSTITUTION

First Amendment

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

UNITED STATES STATUTES

28 U.S.C. Section 1652

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

...

e) Form of Affidavits; Further Testimony; Defense Required. Supporting

and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referrred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific

facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to

this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

(e) Secrecy of proceedings and disclosure.

(1) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony , an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by

this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the

performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss

the indictment because of matters occurring before the grand jury.

(3) Sealed indictments. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

NEW YORK STATE STATUTES

Civil Rights Law : Section 74

Privileges in action for libel. -- A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.